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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ASHLEY ROSE HARRIS, Defendant and Appellant.	A157427 (San Mateo County Super. Ct. No. 18NF006373A)

Appellant Ashley Rose Harris was convicted following a jury trial of battery resulting in serious bodily injury. On appeal, she contends (1) the prosecutor's comments during closing argument equating reasonable doubt with reasonableness constituted misconduct because they lowered the prosecution's burden of proof, and defense counsel was ineffective for failing to object to those comments, and (2) the prosecutor's comments during closing argument equating reasonable doubt with common sense constituted misconduct because they also lowered the prosecution's burden of proof. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On September 11, 2018, appellant was charged by felony information with battery resulting in the infliction of serious bodily injury. (Pen. Code, § 243, subd. (d).)

On January 10, 2019, a jury found appellant guilty as charged.

On May 17, 2019, the trial court suspended imposition of sentence and placed appellant on formal probation for three years with various terms and conditions, including the condition that she serve nine months in county jail.

Also, on May 17, 2019, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

Geoffrey Khanniazi testified that around 1:00 p.m. on March 21, 2018, he was walking through a parking lot on his way back to work after lunch when he witnessed an altercation between two people. He did not know either of the people, one of whom he identified at trial as appellant. He was about 46 feet away when he first noticed appellant standing right next to the driver's door of a black BMW automobile, yelling and screaming at a woman who was sitting in the driver's seat. Appellant, who seemed "very angry," was threatening the other woman, shouting things like, " 'Fucking white bitch.' . . . 'I'm gonna beat your fucking ass.' 'Get the fuck out of the car.' 'Open the fucking door.' " Appellant was kicking and slapping the car; he also saw her grabbing the door handle.

Khanniazi then saw the door of the BMW open and saw the other woman step out of the car and say, " 'What the hell are you doing? What's wrong with you?' " The defendant then punched the woman several times in the upper torso and face. He saw the woman "defending herself, but she wasn't able to. I think she was throwing maybe, like, two punches," one of which might have landed, before appellant grabbed her hair and "took her to the ground." The woman was lying on her back when appellant got on top of her and started punching her repeatedly in the face. The other woman seemed to be trying to protect her face with her hands. Khanniazi believed

appellant punched the woman two to three times while they were standing up and then punched her more than five times while they were on the ground.

Khanniazi approached and tried to pull appellant off of the other woman by yanking her from behind. He lost his balance and fell backwards onto his back. Appellant then fell on top of him, which resulted in him spraining his ankle. The entire incident lasted about 30 to 45 seconds.

After he pulled appellant off of the woman, he saw appellant appear to record herself for five or six seconds, speaking on Snapchat; Khanniazi saw the Snapchat logo on her phone. While recording, she said something like, " 'Look what I did to this bitch over here. She was talking shit and now she got fucked up.' " Appellant then got into her car, which was parked in a space behind the woman's BMW, and drove away. Khanniazi used his phone to take a photograph of the license plate on appellant's car.

Khanniazi then went up to the other woman, who had run back to her car and locked the door after he pulled appellant off of her, to see if she was okay. He saw blood coming from her nose and down her face. Khanniazi gave the photo he took of appellant's license plate number to both the woman and the police.

R.M., the victim in this case, testified that on March 21, 2018, between 12:00 and 1:00 p.m., she was on her way to meet a friend for lunch in San Mateo. She was on the street in her black BMW automobile with her right turn signal on, about to turn into a parking lot when she saw someone, whom she identified at trial as appellant, preparing to exit the same parking lot. Appellant, who appeared to think R.M was going to turn into the exit lane appellant was in, honked her horn and gestured to the right with her thumb. R.M., who had not intended to turn in there, responded by saying, " 'Okay,

Bitch.' " The windows of R.M.'s car were up and she just mouthed the words at appellant.

R.M. then turned into the parking lot at the entrance, looped around to the back, and parked her car. As she drove through the parking lot and parked, she saw that appellant had exited the parking lot, circled back inside through the entrance, followed her car, and parked behind her. After she had parked, R.M. stayed in her car because she had a bad feeling after seeing appellant circle back into the parking lot.

Appellant approached R.M.'s car and started banging on the driver's side window with a fist and trying to open the door. She also took out her cell phone and started apparently videotaping R.M.'s face while saying things like, " 'Who are you calling a bitch? I'm gonna show you who a bitch is[.]' " Appellant was also telling R.M. to get out of the car. When R.M. said she was going to call the police and told appellant to go away, appellant said, " 'What are the police gonna do?' . . . 'Get out.' " R.M. saw appellant reach for the door handle and try to open the door multiple times. R.M. was scared for her life at that point. She called 911, but the dispatcher was having trouble hearing her and pinpointing her location because she was in a parking lot.

Then, about three or four minutes after R.M. had first parked her car and while she was on the phone with the 911 dispatcher, appellant started walking toward her own car. R.M., who thought appellant might be going to "get something," opened her car door a little bit to talk to appellant. Appellant ran back to R.M.'s car and forced the door open enough to get her leg in, which resulted in her kicking R.M. in the ankle.[1] R.M. told appellant

[1] R.M. did not know whether the kick was intentional or a result of appellant trying to keep the door open.

to go away, and after about a minute was able to push appellant's leg out of the car and close the door.

Appellant then started banging on R.M.'s car again, telling her to get out and asking why she was scared. After appellant had banged on the car for another minute or so and after R.M. had managed to describe her location to the 911 dispatcher, R.M. opened the door and appellant came at her aggressively. R.M. tried to close the door again, but could not get it closed, so she got out of her car to defend herself.

The prosecutor played a portion of a video recording from appellant's phone during R.M.'s testimony. R.M. described seeing herself in the video mouthing " 'Go away' " and " 'Fuck you' " from inside her car as she tried to get the car door closed for the second time. The end of the video showed R.M. getting out of her car. R.M. testified that she got out of the car to defend herself; she did not think she had the ability to be safe inside her car because appellant "was aggressively, like, inside of my car forcing me to get out."

After exiting her car, R.M. threw a punch at appellant, but "completely missed." Appellant then came at her and they were pulling each other's hair. Appellant was able to get a good grip on R.M.'s hair and threw her down; R.M. hit the back of her head on the floor. Appellant may have punched her while they were both standing, but she was not sure. R.M. was lying on her back when appellant straddled her, facing her with a leg on either side of her body. R.M. put her hands over her face to try to protect herself, but appellant punched her in the nose three or four times, with heavy blows.

R.M. further testified that at that point, a man approached and pulled appellant off of her. R.M., who was bleeding heavily from her nose, went straight to her car and closed the door, to be safe. Appellant then came back to R.M.'s car and started videotaping her again, as her face was bleeding.

She heard appellant say, " 'Now look who's the bitch.' " After that, appellant got back into her car and drove off.

The police arrived a short time later, as R.M.'s nose was bleeding very heavily, and her head was throbbing. The officers offered to take her to the hospital or have a paramedic examine her, but she refused. While at the scene, R.M. gave a statement to Officer Emley. She was upset and in shock when she gave the statement. After reviewing the statement, she testified that there were a few things she did not recall saying. In particular, she did not recall telling Emley that appellant had punched her once in the nose; appellant punched her in the nose multiple times.

R.M. then drove home. She was in a great deal of pain in her head and nose. Her mother took her to a clinic where she was diagnosed with a concussion before being sent to a hospital emergency room, where she was also diagnosed with a fractured nose. She was later told by a specialist that she needed to have rhinoplasty to repair her nose, but she chose to let her nose heal before having the surgery.[2]

Defense Case

Jeffrey Emley, the investigating police officer who took a statement from R.M. at the scene, testified that R.M. never told him that appellant kicked her. Nor did R.M. describe being able to close the car door once, and then opening it a second time. In her statement, she only described opening the car door once and appellant wedging herself inside the door.

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[2] The doctor who first examined R.M. testified that he diagnosed her with a concussion and a nose injury, before sending her to a hospital emergency room for further treatment. The doctor who examined R.M. at the hospital emergency room testified that a CT scan had revealed that R.M. had a nasal fracture. R.M. also had bruising and tenderness on her forehead and temple, and was again diagnosed with a concussion.

DISCUSSION

Appellant contends (1) the prosecutor's comments during closing argument equating reasonable doubt with reasonableness constituted misconduct because they lowered the prosecution's burden of proof, and defense counsel was ineffective for failing to object to those comments, and (2) the prosecutor's comments during closing argument equating reasonable doubt with common sense constituted misconduct because they also lowered the prosecution's burden of proof.

I. *Trial Court Background*

During closing argument, the prosecutor made the following comments, which appellant argues improperly equated reasonable doubt with "reasonableness" and "common sense": "I'm gonna go through the law and I'm gonna go through the facts. But when you get back into the jury room and you begin to deliberate, what we always said is you do not check your common sense at the door. The law is intended to track your common sense. It is intended to say, 'This is what we think is reasonable, this is what we think the law ought to be, and what people should do in these circumstances.' And when we get into it, sometimes the law can sound a little weird, hard to figure out exactly what it means. The word you will hear over and over and over again is 'reasonable.' The burden is on me. I have to prove this case beyond a reasonable doubt, but when you hear the word 'reasonable,' I want you to think about it; what is reasonable? What is reasonable in this case?"

II. *Legal Analysis*

As the California Supreme Court has "often explained, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments

violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, [appellant] need not show that the prosecutor acted in bad faith. [Citation.] However, she does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).)

A. *Prosecutor's Argument Regarding Reasonableness*

As noted, appellant challenges the part of the prosecutor's closing argument related to "reasonableness," in which he stated: "[The law] is intended to say 'This is what we think is reasonable, this is what we think the law ought to be, and what people should do in these circumstances' and that '[t]he word you will hear over and over and over again is 'reasonable.' The burden is on me. I have to prove this case beyond a reasonable doubt, but when you hear the word 'reasonable,' I want you to think about it; what is reasonable? What is reasonable in this case?" Defense counsel did not object to these comments.

Appellant argues that these comments constituted misconduct because they lowered the prosecution's burden of proof. Appellant further argues that, to the extent defense counsel's failure to object and request an

admonition in the trial court means that she forfeited her challenge to the prosecutor's "reasonableness" language, that failure was based on counsel's ineffective assistance. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1035 [a claim of prosecutorial misconduct is preserved for review " 'only if the defendant made "a timely and specific objection at trial" and requested an admonition," or "if an objection would have been futile or a request for admonition ineffectual"].)

First, even assuming appellant preserved her claim of prosecutorial misconduct for review, we question her argument that this "reasonableness" language was in fact improper, considering that the prosecutor was simply referring to the jury's need to use reason in determining whether a reasonable doubt existed, and was not equating reasonable evidence with the prosecutor's burden of proof. (See, e.g., *People v. Dalton* (2019) 7 Cal.5th 166, 259–260 [finding no impropriety in prosecutor's comment that, inter alia, " '[r]easonable doubt' was '[s]ubject to reason; not guesses, not hopes, not hunches, not attorneys' arguments' "]; cf. *People v. Romero* (2008) 44 Cal.4th 386, 416 [nothing in prosecutor's comment during closing argument that jury must " 'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable' " lessened prosecution's burden of proof]; compare *People v. Centeno* (2014) 60 Cal.4th 659, 672 [in case relied on by appellant, Supreme Court found that prosecutor's repeated request in closing argument that jury consider whether various unlikely scenarios suggested by the defense were reasonable or whether " '*the defendant abused Jane Doe. That is what is reasonable, that he abused her*' " improperly "left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden"].)

Moreover, to the extent the prosecutor's challenged comments were in any way misleading regarding the burden of proof (and assuming appellant has not forfeited the issue), drawing on our Supreme Court's analysis in *Cortez*, we conclude that when the comments are viewed in context, there is no reasonable likelihood that the jury applied them in an objectionable fashion. (See *Cortez, supra,* 63 Cal.4th at p. 130.)

In *Cortez*, the prosecutor had stated during his rebuttal argument: " 'The court told you that beyond a reasonable doubt is not proof beyond all doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me." ' Defendant's counsel objected that these comments 'misstate[d] the law.' Before the court ruled on the objection, the prosecution added, 'That's proof beyond a reasonable doubt.' The trial court then overruled the objection." (*Cortez*, *supra*, 63 Cal.4th at p. 130.)

The Supreme Court first "observe[d] that the challenged remarks, viewed in isolation, were incomplete at best" in defining the beyond a reasonable doubt standard. (*Cortez*, *supra*, 63 Cal.4th at p. 131.) The court nevertheless found that, "viewing the challenged statements in context, . . . no reasonable likelihood that jurors understood them as defendant asserts," i.e., as lowering the prosecution's burden of proof. (*Ibid*.) The court explained: "Initially, in determining how jurors likely understood the prosecution's arguments, we do ' "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." ' [Citations.]" (*Ibid*.)

In light of that principle, the *Cortez* court found it "significant that the trial court properly defined the reasonable doubt instruction in both its oral jury instructions and the written instructions it gave the jury to consult during deliberations. . . . As we have explained, '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*Cortez*, *supra*, 63 Cal.4th at p. 131.) Indeed, the trial court had "emphasized in several ways that jurors should follow its instructions rather than anything potentially contrary in counsel's arguments." (*Id.* at p. 132.) The Supreme Court also found it significant that defense counsel had emphasized the reasonable doubt instructions during his closing argument and the prosecutor's comments on reasonable doubt had specifically referred the jury to the court's instruction on that subject, which made it unlikely that jurors would have understood the prosecutor's challenged statement as a repudiation of the court's instructions or an invitation to the jury to disregard them. (*Id.* at pp. 132–133.)

Our high court concluded: "In summary, given that the challenged comments were brief and constituted a tiny, isolated part of the prosecution's argument, that the prosecution was responding to defense counsel comments, that the prosecution expressly referred the jurors to the instruction they had on reasonable doubt, that both the court and defense counsel properly defined 'reasonable doubt' numerous times, and that the jury had written instructions during deliberations that properly defined the standard, we find no reasonable likelihood the jury construed or applied the prosecution's challenged remarks in an objectionable fashion. We therefore reject defendant's misconduct claim." (*Cortez*, *supra*, 63 Cal.4th at pp. 133–134; accord, *People v. Dalton*, *supra*, 7 Cal.5th at p. 260.)

We find the Supreme Court's analysis and conclusion in *Cortez* directly applicable to the challenged language in this case.

First, viewing the prosecutor's reasonableness comments in context, we find that they "were brief and constituted a tiny, isolated part of the prosecution's argument." (*Cortez*, *supra*, 63 Cal.4th at p. 133; see also *id.* at p. 131 ["we do ' "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." ' "].)[3]

Second, the prosecutor referred several times to his burden of proving appellant's guilt beyond a reasonable doubt and quoted the part of CALCRIM No. 220 that defines reasonable doubt. (See *Cortez*, *supra*, 63 Cal.4th at p. 133 [prosecutor "expressly referred the jurors to the instruction they had on reasonable doubt"].)

Third, the court instructed the jury on the presumption of innocence, the requirement that the prosecution prove appellant's guilt beyond a reasonable doubt, and the definition of reasonable doubt, both at the start of trial and after closing arguments. (See CALCRIM No. 220; *Cortez*, *supra*, 63 Cal.4th at pp. 131, 133.) The court also told the jury, just after closing arguments and before instructing it on the relevant law, that "[y]ou must follow the law as I explain it to you even if you disagree with it" and that "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (See CALCRIM No. 200.) Similarly, the court instructed the jury that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the

[3] These comments filled less than half a page of the approximately 53 total pages of the prosecutor's closing argument and rebuttal contained in the reporter's transcript on appeal.

attorneys discuss the case, but their remarks are not evidence." (See CALCRIM No. 222.) The court also reminded the jury during closing arguments, when it overruled the prosecutor's and defense counsel's objections on several occasions, that their statements were argument and that the jury was the ultimate decision-maker. (See *Cortez*, at p. 132 ["the trial court here emphasized in several ways that jurors should follow its instructions rather than anything potentially contrary in counsel's argument"].)

Thus, the jury was made fully aware of the law on reasonable doubt and the need to follow the court's instructions on the law. (See *Cortez*, *supra*, 63 Cal.4th at p. 131 [" '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade' "].)

In conclusion, viewing the challenged comments in the context of the prosecutor's entire argument and the court's instructions, "we find no reasonable likelihood the jury construed or applied the prosecution's challenged remarks in an objectionable fashion," and therefore reject appellant's claim of prosecutorial misconduct. (*Cortez*, *supra*, 63 Cal.4th at pp. 133–134.)[4]

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[4] In light of this conclusion, defense counsel's failure to object to the prosecutor's reasonableness comments necessarily did not constitute ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [to prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms" and must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"].)

B. *Prosecutor's Argument Regarding Common Sense*

As noted, during the prosecutor's closing argument, just before the comments on reasonable doubt discussed in part II.A., *ante*, he stated: "I'm gonna go through the law and I'm gonna go through the facts. But when you get back into the jury room and you begin to deliberate, what we always said is you do not check your common sense at the door. The law is intended to track your common sense."

Appellant contends these comments equated reasonable doubt with common sense, which lowered the prosecution's burden of proof and therefore constituted misconduct. Appellant acknowledges that defense counsel did not object to these comments, but asserts that any objection or request for an admonition would have been futile under existing California law. (See *People v. Potts*, *supra*, 6 Cal.5th at p. 1035 [a claim of prosecutorial misconduct is preserved for review despite a failure to object "if an objection would have been futile or a request for admonition ineffectual"].)

First, not only did defense counsel fail to object to the prosecutor's remarks about jurors using common sense while deliberating, defense counsel embraced the prosecutor's common-sense comments in his own closing argument. Initially, while arguing that the evidence showed that appellant acted in self-defense, defense counsel said: "Common sense will tell you there was no crime committed. You don't need the law to tell you that." Later in his argument, while asserting that R.M. would not have opened her car door if she was afraid, counsel said: "[The prosecutor] is right: Please don't leave your common sense at the front door."

Second, assuming appellant has not forfeited this issue, the prosecutor's and defense counsel's references to common sense did not in fact "equate[] common sense with reasonable doubt," as appellant claims. Rather,

looking at their remarks in context, the attorneys were speaking about the need to use common sense in considering the facts and/or the law generally.

Finally, even assuming that the prosecutor's common-sense comments in any way amounted to indirect references to reasonable doubt, such comments are permissible under California law. (See *People v. Bickerstaff* (1920) 46 Cal.App. 764, 772, 775 [in a "petition to have the cause heard in the supreme court," Supreme Court disapproved appellate court's finding that trial court had erred when it instructed jury that reasonable doubt was "a fair doubt, based upon the testimony, reason and common sense," stating that this instruction "should not be considered erroneous, although it is not as full and possibly not as clear as the instruction usually given"].)[5]

DISPOSITION

The judgment is affirmed.

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[5] Appellant acknowledges this California precedent, but argues that two cases from other jurisdictions support her contention that such comments are improper because they lessen the prosecution's burden of proof, and maintains that those courts' holdings "should be adopted here." (See *State v. Mitchell* (2000) 269 Kan. 349, 360 [while "it is not error for prosecutor to mention common sense in the closing argument or to tell the jury that it can use common sense in reaching its decision," prosecutor's remarks "defining 'reasonable doubt' as 'common sense' were improper"]; *State v. Hunter* (Mo.Ct.App. 1984) 676 S.W.2d 34, 35 [prosecutor's definition of reasonable doubt as common sense was improper].) Even assuming the prosecutor's comments in this case were directed to the reasonable doubt standard, we are bound by decisions of the California Supreme Court, not the courts of Missouri or Kansas. (A*uto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *People v. Bickerstaff*, *supra*, 46 Cal.App. at pp. 772, 775.)

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

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